NG KIM CHENG

v.

NAIGAI NITTO SINGAPORE PTE. LTD. & ANOR.

HIGH COURT, SINGAPORE
LP THEAN J
[SUIT NO. 1190 OF 1985]
5 FEBRUARY 1991

TORT: *Negligence - Injury - Course of employment - Statutory duty - Breach - Whether warehouse is a "factory" - Defective forklift - Meaning of "maintained" - Safe system of work - Vicarious liability of independent contractor - Competence of agent - Contributory negligence - Factories Act [Sing], ss. 7(1), 31(1)(b).*

The plaintiff P was a storekeeper who was employed by the 1st defendant N, a freight forwarder. The 2nd defendant W was an independent contractor engaged by N to service its machines every month. On 17 February 1984, W was asked to repair a defective forklift. On the following day, after it had been repaired, P was using the forklift to move certain goods when the brakes failed. As a result, the forklift toppled over and seriously injured P, who sued N for breach of statutory duty contrary to s. 31(1)(b) of the Factories Act (Cap 104) (the Act), and common law negligence. W was sued in negligence for failing to properly repair the forklift. Both P and N accepted that the warehouse was a factory under the Act and that the forklift is a lifting appliance or lifting machine under s. 7(1) of the Act.

Held:

[1] Driving the forklift at times was incidental to P's position as a storekeeper and there was evidence to show that on the morning in question, P drove it in connection with his work and for N's purposes.

[2] Section 31(1) imposes an absolute liability on the employer to maintain properly the equipment in an efficient state, in efficient working order and in good repair. The word "maintained" in s. 31(1)(b) denotes a continuance of a state of working efficiency and s. 31(1) imposes on the occupier of a factory, among other things, an absolute and continuing obligation to maintain properly a lifting appliance or lifting machine which includes a forklift.

[3] P has proved that at the material time, the brakes of the forklift were defective - therefore N was in breach of its statutory duty under the Act.

[4] An employer cannot escape liability by delegating the performance of its duty to an independent contractor; if he does delegate that duty and it is performed negligently, he remains vicariously liable.

[5] N was also in breach of its duty to take reasonable care to provide a safe system of work as it should have ensured that its regular driver was around when W repaired and tested the forklift; N had also failed to provide adequate and proper supervision and maintenance of the forklift. In addition, N also failed to prove that W was reasonably competent to undertake the repair and maintenance of the forklift.

[Judgment for the plaintiff.]

Cases referred to:

Clyde Coal Co. v. English [1938] AC 57 ***(foll)***
Cole v. Blackstone & Co. Ltd. [1943] 1 KB 615 ***(foll)***
Galashiels Gas Co. Ltd. v. O'Donnell or Millar [1949] AC 275 ***(foll)***

Joseph Smith v. Charles Baker & Sons [1891] AC 325 ***(foll)***
Summer v. William Henderson & Sons Ltd. [1964] 1 QB 450 ***(cit)***
Wilsons & Clyde Coal Co. Ltd. v. English [1938] AC 57 ***(foll)***

Legislation referred to:
Factories Act (Cap 104) [Sing], ss. 7(1), 22(1), 25(4), 31(1)(b)

For the plaintiff - Karuppan Chettair
For the 1st defendant - Yap Tyou Min
For the 2nd defendant - Genevienne Tan

JUDGMENT

LP Thean J:

The plaintiff is an employee of the 1st defendant and at the material time was employed as a storekeeper at the 1st defendant's warehouse which is on the ground floor of PSA Multi-Storey Complex, Block 20, Pasir Panjang Road. The 1st defendant is engaged in the business of a freight forwarder, and its business involves, among other things, unpacking and packing of goods at its warehouse and delivering them to its customers. At the material time, there were provided in the warehouse two forklifts which were used by the 1st defendant's employees, including the plaintiff, for moving, loading and unloading goods, and one of the forklifts was a Komatsu model FD 20T bearing serial number 1105494, which was the forklift in question in this case.

At the material time, the 2nd defendant was engaged by the 1st defendant to service the forklifts under a servicing contract, and pursuant to that contract the 2nd defendant's mechanic serviced the two machines every month.

On 17 February 1984, one of the forklift drivers, Lim Boon Chong (Lim) complained to the plaintiff that the brakes of the forklift that is, the Komatsu forklift, were not working. The plaintiff called the 2nd defendant, and the latter's mechanic came and attended to the repair. After the repair was carried out, the plaintiff signed a job completion form. The forklift was subsequently used by Lim and he found that brakes were still defective. He said he had to depress the brake pedal twice before he could bring the forklift to a stop.

On the following morning, 18 February 1984, the forklift was parked at a corner on the loading platform, which was raised above the ground level by about 4 to 5 feet so that containers could be driven and parked alongside to load and unload goods. The plaintiff who was anxious to move certain goods for the purpose of effecting delivery to customers mounted the forklift and started to operate it. While he was reversing the forklift, he found that the brakes were ineffective, and he could not stop the forklift which continued to move and eventually toppled over the edge of the platform. As the forklift fell, the plaintiff leapt from the driver's seat but unfortunately could not escape injury. His left arm was pinned underneath the forklift and was severely crushed; the arm was subsequently amputated at the point above the elbow.

In respect of the injuries which he sustained in the accident, he brought this action against the 1st and 2nd defendants. His claim against the 1st defendant was for (i) breach of statutory duty in that the 1st defendant had failed to maintain properly and keep in efficient working order and good repair the forklift contrary to s. 31(b) of the Factories Act (Cap. 104), and (ii) negligence for failing to take any adequate precautions for the safety of the plaintiff, committing the plaintiff to operate the forklift which was in a dangerous and defective condition and failing to maintain or repair properly the brakes of the forklift. His claim against

the 2nd defendant was for negligence for failing to repair the brakes of the forklift which the 2nd defendant knew or ought to know was defective and failing to locate properly the fault or defect in the braking system.

Both the defendants in their pleadings resisted the claim. In the defence of the 1st defendant, the following defences were raised:

(i) the plaintiff at the material time drove the forklift outside the course of his employment;

(ii) the 1st defendant's warehouse was not a factory within the meaning of the Factories Act and that the forklift was not a lifting appliance or lifting machine within the meaning of s. 7(1) of the Factories Act;

(iii) a denial of negligence or breach of statutory duty,

(iv) the accident was caused or contributed to by the negligence of the plaintiff, and

(v) in the alternative, the accident was caused by the negligent and faulty repair of the forklift carried out by the 2nd defendant.

The 2nd defendant in the defence denied that its servant or agent was negligent in repairing the forklift and averred that the forklift had been properly repaired in the afternoon of 17 February 1984. The 2nd defendant further averred that the accident was caused solely or contributed to by the negligence of the plaintiff.

At the commencement of the hearing, Counsel for the 2nd defendant informed me that she had not received instructions to defend the action and in fact on that morning her instructions were not to defend the action; thereafter she did not participate further in the proceedings. The hearing proceeded and at the conclusion I found that both the defendants were liable in damages to the plaintiff. At the request of the 1st defendant's Counsel and on the basis of his submission, I apportioned the liability between the 1st and the 2nd defendants in the following proportions: 30% to the 1st defendant and 70% to the 2nd defendant. I now give my reasons.

Before I proceed and for completeness, I should dispose of, first, one point raised in the defence but which was not really argued. The 1st defendant pleaded, and during the cross-examination of the plaintiff Counsel for the 1st defendant suggested, that the plaintiff in driving the forklift was acting outside the course of his employment. I found no substance in such plea or suggestion. The plaintiff's position was a storekeeper and incidental to his work he had to drive the forklift at times. There was evidence before me, which I accepted, that both he and his manager occasionally had to drive the forklift. On the morning in question, as the forklift driver was not around, he drove the forklift, and he drove it in connection with his work and for the purpose of the 1st defendant. Clearly, what he did was fully within the course of his employment. The point raised by the 1st defendant was wholly unarguable on the facts.

I now turn to the claim of the plaintiff against the 1st defendant for breach of statutory duty. The arguments of Counsel for the plaintiff and the 1st defendant proceeded on the basis that the warehouse, in which the plaintiff was injured, is a factory within the meaning of the Factories Act, and it has therefore become unnecessary for me to determine that point. Counsel for the 1st defendant also accepted that the forklift is a lifting appliance or lifting machine within the meaning of s. 7(1) of the Act. The only point in issue was whether there was a breach by the 1st defendant of s. 31(1) of the Act. The said section, in so far as relevant, provides:

31. (1) No lifting appliance or lifting machine shall be used unless:

(a) if and every part of it including all working gear and all plant or gear used for anchoring or fixing the appliance or machine is of good construction, sound material, adequate strength and substance, and free from patent defect;

(b) it is properly maintained; and

The word "maintained" is defined in s. 7(1) to mean "maintained in an efficient state, in efficient working order and in good repair".

Counsel for the plaintiff submitted that the duty imposed by s. 31(1) is an absolute one and that proof of the failure of the brakes of the forklift was sufficient to establish the breach of such duty, and as a result of such breach of duty the plaintiff sustained injuries. On that ground the defendant was liable. He relied on *Cole v. Blackstone & Co. Ltd.* [1943] 1 KB 615 and *Galashiels Gas Co. Ltd. v. O'Donnell or Millar* [1949] AC 275. In the first case the plaintiff claimed damages for the death of her husband who met with the fatal accident in the course of employment. The deceased prior to his death was a crane-man, and to reach the driving cab he had to use a ladder some 20 feet high. While he was ascending the ladder one of the rungs gave way and he fell to the ground and sustained injuries from which he died. Section 25(4) of the Factories Act 1937 of the United Kingdom provided: "All ladders shall be soundly constructed and properly maintained", and s. 152(1) provided that the word "maintained" means "maintained in an efficient state, in efficient working order and in good repair". It was held that the obligation imposed by s. 25(4) of the Factories Act was an absolute obligation and could not be discharged by the occupier of the factory taking all practical steps to see that the ladder was in an efficient state and good repair. Macnaghten J said, at p. 617:

> I see no ground for qualifying the words of s. 25, subs. 4, of the Factories Act 1937. The duty to keep all ladders in an efficient state and in good repair appears to me to be as absolute as the duty imposed by the Act to fence all dangerous parts of machinery. It is true that the defendants took great care for the safety of their men, and that this particular failure was one which, apparently, nobody could have anticipated. The fact that none of the other screws in the ladder were affected with corrosion indicates that there must have been something exceptional about this particular rung to bring about the deplorable result that it gave way. It was suggested that the rung must have worked slightly loose and that sulphur fumes from the adjacent factory must have caused the corrosion: but neither the "safety first" committee nor Cole observed that there was anything amiss with the rung, or if they did observe that the rung was at all loose, they did not think it material. However that may be, the ladder was not in fact in an efficient state or in good repair on the morning of the accident.

The decision of Macnaghten J was approved by the House of Lords in *Galashiels Gas Co. Ltd. v. O'Donnell or Millar* [1949] AC 275. There, the plaintiff claimed damages for the fatal injuries sustained by her husband in the course of his employment. The deceased was found seriously injured lying at the bottom of the lift shaft, and the lift was found to be at the top of the lift shaft and the liftway gates on the first floor were open. It was found by the Court that the brake of the lift in question was not in efficient working order at the time when the accident happened, though it appeared to have worked efficiently before and after the accident. Section 22(1) of the Factories Act 1937 provided:

> Every hoist or lift shall be of good mechanical construction, sound material and adequate strength and be properly maintained

and by s. 155(2) the word "maintained" means "maintained in an efficient state, in efficient working order and in good repair". It was held that s. 22(1) imposed an absolute and continuing obligation on the factory occupier so that proof of any failure of the equipment established a breach of statutory duty. Lord Morton of Henryton said, at pp. 282-283:

> My Lords, in my view the Lord Ordinary supplied the correct answer to the whole of this argument when he said: 'In my opinion ... there is imposed on the defenders an absolute and continuing obligation binding upon them which is not discharged if at any time their lift mechanism, in this case the brake, is not maintained in an efficient state, in efficient working order, and in good repair.' The words of the sub-section are imperative "shall be properly maintained" and I can find nothing in the context or in the general intention of the Act, read as a whole, which should lead your Lordships to infer any qualification upon that absolute obligation.

Lord MacDermott said at p. 287:

> My Lords, had the legislature thought fit not to define "maintained" Mr. Guest's submission on this aspect of the case would have encountered less difficulty. But when the terms of the definition are regarded the meaning for which he has contended is, in my opinion, at once displaced. To my mind they indicate conclusively that in s. 22, sub-s. I, "maintained" is employed to denote the **continuance** of a state of working efficiency. In the ordinary use of language one cannot be said to maintain a piece of machinery in efficient working order over a given period if, on occasion within that period, the machinery, whatever the reason, is not in efficient order. In short, the definition describes a result to be achieved rather than the means of achieving it. I do not think the use of the word "properly" weakens or detracts from the compelling effect of this definition. Why exactly "properly" was inserted is perhaps a matter of speculation, as the Act does not appear to furnish any very obvious explanation. But, however this may be, the word is certainly not incompatible with the duty in question being absolute in character. There may be more than one way of discharging such a duty and I do not see that the quality of the duty need be affected by an additional obligation to discharge it in a proper manner.

And later he said:

> There was abundant proof that the mechanism had failed and that failure resulted in the death of the respondent's husband. Once the absolute nature of the duty imposed by the statute is established, that is proof enough.

The relevant provisions of our Factories Act are in *pari materia* with the corresponding provisions of the Factories Act 1937 of the United Kingdom and should therefore receive the same construction as laid down in these cases. On this basis, s. 31(1) imposes an absolute duty on the employer to maintain properly the equipment within the meaning of the Act, that is in an efficient state, in efficient working order and in good repair. In particular, the word "maintained" in s. 31(1)(b) denotes a continuance of a state of working efficiency, and hence s. 31(1) imposes on the occupier of a factory, among other things, an absolute and continuing obligation to maintain properly a lifting appliance or lifting machine, which, as both Counsel agreed, includes a forklift.

Reverting to the facts before me, it has been proved by the plaintiff, and it was not in any way disputed by the 1st defendant, that at the material time the brakes of the forklift were defective and accordingly was not "in efficient state, in efficient working order and in good repair". That having been established, the 1st defendant was in breach of the statutory duty and as a result of such breach the plaintiff sustained injuries. The plaintiff therefore succeeded in his claim for breach of statutory duty.

I now turn to his claim at common law for negligence. At common law, an employer is under a duty to use reasonable care to provide, among other things, safe plant and appliances for use by its employees and to maintain them in a proper condition. In *Joseph Smith v. Charles Baker & Sons* [1891] AC 325 at p. 362, Lord Herschell described the duty as follow:

> It is quite clear that the contract between employer and employee involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk.

To this may be added what Lord Wright said, *obiter*, in *Wilson & Clyde Coal Co. v. English* [1938] AC 57 at p. 84:

> the obligation to provide and maintain proper plant and appliances is a continuing obligation.

An employer cannot escape liability by delegating the performance of such duty to an independent contractor; if he does delegate the performance of such duty, which in some cases he would have to do, and such duty is performed negligently he remains vicariously liable. The leading authority on this point is *Wilson & Clyde Coal Co. Ltd. v. English* [1938] AC 57 which was an appeal to the House of Lords from the Court of Session in Scotland. The respondent was employed by the appellants to work underground in one of the appellants' collieries and was killed in the course of employment, and action was brought against the appellants for negligence. The contention of the appellants was that they had delegated to a competent agent and manager the duty of providing a reasonably safe system of working and that any negligence in the provision of such system was that of such delegates and under the doctrine of common employment the appellants were not liable. The arguments were rejected by the House of Lords who held, *inter alia*, that the provision of a safe system of working in a mine was an obligation of the owner and if he appointed an agent to perform it, he remained vicariously responsible for his agent's negligence. Four of the five Law Lords who heard the appeal in their speeches made clear pronouncements on the point, and it is sufficient to quote the following extracts from the speeches of Lord Thankerton and Lord Macmillan. Lord Thankerton said, at pp. 64-65:

> The appellants maintain that the present case is covered by the second proposition, in that they have delegated to a competent agent and manager the duty of providing a reasonably safe system of working, and that any negligence in the provision of such a system is the negligence of these delegates, and, under the doctrine of common employment, that the appellants are not liable therefor.
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> It seems to me that the fallacy in the appellant's argument lies in the view that the master, being under a duty to take due care in the provision of a reasonably safe system of working, is absolved from that duty by the appointment of a competent person to perform the duty. In my opinion the master cannot "delegate" his duty in this sense, though he may appoint some one, as his agent in the discharge of the duty, for whom he will remain responsible under the *maxim respondeat superior*.

Lord Macmillan said, at p. 75:

> Now I take it to be settled law that the provision of a safe system of working in a colliery is an obligation of the owner of the colliery. He cannot divest himself of this duty, though he may - and, if it involves technical management and he is not himself technically qualified, must - perform it through the agency of an employee. It remains the owner's obligation, and the agent whom the owner appoints to perform it performs it on the owner's behalf. The owner remains vicariously responsible for the negligence of the person whom he has appointed

to perform his obligation for him, and cannot escape liability by merely proving that he has appointed a competent agent. If the owner's duty has not been performed, no matter how competent the agent selected by the owner to perform it for him, the owner is responsible.

That case admittedly was concerned with the duty of an employer to take reasonable care to provide a safe system of working. It has been applied in innumerable cases to all aspects of the employer's duty of care for the safety of his employee: per Philimore J in *Summer v. William Henderson & Sons Ltd.* [1964] 1 QB 450 at p. 457. In my opinion, it is certainly applicable to this case which was concerned with the provision of safe and proper plant and appliances by an employer to his employees to operate. The 1st defendant had engaged the 2nd defendant to service and maintain the equipment, that is forklift. The latter's employee on the day before the accident carried out the repair negligently: he failed to repair the brakes properly, as after the purported repair work had been carried out, Lim operated the forklift and found that the brakes were defective. The 1st defendant in these circumstances cannot escape liability for breach of its common law duty to its employee.

Quite apart from this breach of duty, the 1st defendant was also in breach of its duty to take reasonable care to provide a safe system of working. The 1st defendant had at that time a regular driver of the forklift. That was Lim. But Lim was not around when the mechanic of the 2nd defendant came to repair the forklift. Lim said he was away having coffee; he did not even know if anyone had come and repaired the forklift. He should have been present while the repair was being carried out or should have been around at the warehouse and tested the forklift after the repair had been carried out. No one on behalf of the 1st defendant did any testing of the forklift after the purported repair work had been carried out by the mechanic of the 2nd defendant. The 1st defendant ought to have the forklift tested before it was allowed to be used. There was therefore a failure on the part of the 1st defendant to provide adequate and proper supervision and checking of the maintenance of the forklift.

In the defence, the 1st defendant averred that in maintaining the forklift it had engaged the 2nd defendant, a "well-known firm of experts in the repair and maintenance of, *inter alia*, forklifts." However, no evidence has been adduced to show that the 2nd defendant whom the 1st defendant engaged was competent or reasonably competent in the repair and maintenance of the forklifts. This burden undoubtedly rests with the 1st defendant and it had failed to discharge it. The fact that the 2nd defendant did not at the trial defend the action and, so far as I understand, is no longer in business does not speak well of the 2nd defendant's reputation or competence.

The 1st defendant relied heavily on Lim's evidence to prove that the plaintiff was guilty of a rash and negligent act. Lim said that before he left the warehouse that evening at about 10.00 p.m. he informed the plaintiff that the brakes of the forklift were defective. He also said that on the following morning when he came to work he saw the plaintiff and told the plaintiff again of the defective brakes and asked the plaintiff not to drive the forklift. I found great difficulty in accepting his evidence. First, before the purported repair work was carried out by the 2nd defendant's mechanic, the plaintiff already knew of the defective brakes. He it was who sent for the mechanic. Prior to that, he was informed by a forklift driver that the brakes were not working, and Lim was the regular driver of that forklift. It must have been Lim who informed him. But Lim did not know that any repair work to the brakes was carried out by the 2nd defendant's mechanic. So far as he was concerned, the brakes had never been repaired that day. Therefore, there was no need for him to inform the plaintiff again of the defective brakes that evening at 10.00 p.m. just before he left the warehouse. That would really be an abundance of caution on the part of Lim which I could not accept. Secondly, he

said that when he informed the plaintiff that evening that the brakes of the forklift were not working, the plaintiff did not say anything in response. That indeed is very strange and surprising, because the plaintiff was the one who sent for the 2nd defendant's mechanic to repair the forklift and he was the one also who signed the job completion form of the 2nd defendant. If Lim had informed the plaintiff that evening of the continuing defects in the brakes of the forklift, as he claimed he had, the plaintiff would have reacted with expression of surprise and annoyance.

I also could not accept Lim's evidence that on the morning of the accident he did inform the plaintiff of the defective brakes and asked him not to drive the forklift. I think that is pure fabrication. The plaintiff's evidence was, and I accepted his evidence, that on that morning he did not see Lim at the warehouse, and that was why he went and operated the forklift himself. If Lim were around, he would have asked Lim to operate the forklift instead of doing it himself. That was Lim's job. There was no rash and negligent act on the part of the plaintiff.

In my judgment, the plaintiff succeeded in establishing his claim at common law for negligence against the 1st defendant.

The 2nd defendant was not represented before me throughout the greater part of the hearing and no evidence was adduced by it to resist the claim. I found that the 2nd defendant's mechanic was negligent in repairing the brakes. As I have said, the mechanic did not repair the brakes properly. Accordingly, the 2nd defendant was also liable to the plaintiff.

Counsel for the 1st defendant asked me to apportion the liability between the two defendant's and he submitted that the 2nd defendant was more to blame for the accident. On the basis of his submission, I apportioned the liability in the proportion of 30% to the 1st defendant and 70% to the 2nd defendant.

On the quantum of damages, there were disputes only on 3 items:

(i) actual loss of earnings, that is pre-trial loss;

(ii) special damages for the cost of an artificial limb and the maintenance thereof, and

(iii) damages for loss of future earnings.

General damages for pain and suffering and loss of amenities were agreed at $65,000, and the special damages, other than the costs of an artificial limb and of maintenance thereof and actual loss of earnings, were agreed at $1,150. Having regard to all the relevant circumstances, I awarded a sum of $56,000 for pre-trial loss, a sum of $25,000 for the cost of an artificial limb and maintenance, and a sum of $54,000 for loss of future earnings; and the last amount was based on a yearly multiplicand of $9,000 and a multiplier of 6.

Also found at [1991] 3 CLJ 1959